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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirty-third session

SUMMARY RECORD (PARTIAL)* OF THE 676th MEETING

Held at Headquarters, New York,
on Monday, 12 June 2000, at 10 a.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

CONTENTS

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES

* No summary record was provided for the first part of the meeting.

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00-47525 (E)

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The meeting was called to order at 10.45 a.m.

The discussion covered in the summary record began at 11.30 a.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (A/CN.9/466, 470, 472 and Add.1-4)

1. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the Group's report on the work of its thirty-first session was contained in document A/CN.9/466; the text of the draft Convention as adopted by the Working Group was annexed to the report. As requested by the Commission, the Secretariat had prepared an analytical commentary on the draft Convention, which could be found in document A/CN.9/470. The text used for the commentary was the text adopted by the Working Group, with minor editorial changes. As requested by the Working Group, the Secretariat had circulated the text of the draft Convention to Governments and international organizations; the comments received had been issued in documents A/CN.9/472 and Add.1-4.

2. The Commission might wish to begin by considering issues which had been identified by the Working Group as the most important pending issues. It could first address the issue of the scope of application, in particular the question of assignment of receivables other than trade receivables. Another very important issue was the definition of the term "location", which was defined in article 6, subparagraph (i), and would need to be considered also in connection with articles 24 to 27. Once the Commission had addressed those issues, it could take up the articles of the draft Convention in numerical order. The Commission would need to decide whether the final adoption of the draft Convention should take place in the General Assembly or at a diplomatic conference.

3. The CHAIRMAN said that it was implicit in the suggestion by the Secretariat that the Commission would defer consideration of the title and preamble of the draft Convention until after it had considered the substantive articles.

4. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the Working Group had focused on receivables arising from the sale of goods or the provision of services (trade receivables). It had become clear that a number of other types of receivable could appropriately be included in the scope of the draft Convention, including consumer receivables arising from transactions for personal, family or household purposes, receivables owed by consumers, and receivables arising from a variety of financial transactions including swaps, derivatives, payment and security settlement systems, letters of credit, deposit accounts, and so forth. The Working Group had felt, however, that those other types of receivables would need special treatment: either certain issues addressed in the draft Convention should be addressed in a different way, or the assignment of such receivables should be excluded altogether on the grounds that they were subject to sufficient regulation and might not need additional regulation in the draft Convention.

5. The result of the Working Group's deliberations was reflected in the two variants of article 5 of the draft Convention. Variant A reflected a narrow

exclusion, and variant B a broader exclusion. Under variant A, the assignment would still remain valid as between the assignor and the assignee, but its effects as against the debtor would be left to the law applicable outside the draft Convention; under variant B, the validity of an assignment would be left altogether to the law applicable outside the draft Convention. A further difference between the two variants was the inclusion of paragraph 2 in variant A; the reason was that, once the debtor was protected, under paragraph 1, he would not need to have the right to terminate the original contract.

6. The comments made by industry representatives, reproduced in document A/CN.9/472 and Add.1-4, included a third suggestion which was an amended version of variant B. Under that amendment, unless the debtor consented, articles 11 and 12 would apply only to assignments of trade receivables. If articles 11 and 12 did not apply, the validity of the assignment would be left to be determined by applicable law; if it was determined to be invalid, the rest of the draft Convention would not apply.

7. The draft Convention did not address, and could not address, the form of the underlying contract: whether it needed to be in writing, and whether an assignment clause that was an oral agreement would need to be honoured in the same way as any other oral agreement between participants in financial arrangements under current law.

8. In the communications received by the Secretariat, reference had been made to other types of receivable, such as deposit accounts, which might need to be treated in the same way.

9. Mr. MORÁN BOVIO (Spain) said that his delegation's chief difficulty with variant B was the reference to the rules of private international law, which might be an obstacle in determining the applicable regime. With the addition proposed by the European Banking Federation and reproduced in document A/CN.9/472/Add.1, variant B was very similar to variant A; however, variant A had the advantage of being fuller and clearer, and was therefore preferable.

10. Mr. FERRARI (Italy) said that, if the Commission opted for variant B, it would have to retain the reference to the rules of private international law.

11. Mr. DUCAROIR (Observer for the European Banking Federation) noted that the proposal made by the European Banking Federation (EBF) and other international organizations was a global proposal from the banking and financial industry. In response to the comment by the Spanish delegation, he noted that the words "in conformity with the law applicable by virtue of the rules of private international law" had not been suggested by EBF but had been part of the initial text proposed by the Canadian delegation.

12. The banking and financial industry had at first requested the exclusion of financial receivables from the scope of the Convention, but the Working Group had not shared that opinion and had not wished to narrow the scope of the Convention. Noting that decision of principle, which seemed irrevocable, the banking and financial industry wished for a particular regime to be applied to those receivables, within the Convention, in view of the constraints described

in the comments from EBF, as well as in the comments of the International Swaps and Derivatives Association (ISDA) and the Financial Markets Lawyers Group.

13. Variant A was interesting, but introduced an element of uncertainty. Given the existence of different legal regimes, particularly in European countries, it was difficult to see how an assignment could be valid as between the assignor and the assignee, when there were no effects against the debtor. The Federation therefore preferred variant B, which provided for the exclusion of financial receivables, referred to in the document as receivables other than trade receivables, from the application of articles 11 and 12 of the Convention. Variant B also proposed their exclusion from chapter IV, section II, but that seemed unnecessary: if articles 11 and 12 did not apply, there was no reason to be concerned about chapter IV, section II. However, in its present form, the text went too far. Rather than revising variant B, he hoped that it would be possible to review article 6 to amend the definition of "trade receivable" and to add three further definitions, as set out in document A/CN.9/472/Add.1.

14. Mr. BURMAN (United States of America) said that the issue of scope was perhaps the most significant issue relating to the draft Convention. Having conferred with many industry and financial groups in his country, his delegation's general conclusion had been that the draft Convention rules had the greatest impact and worked very well when the receivable related to the sale or lease of goods or another kind of trade or commercial receivable. However, in the case of financial receivables, the Convention rules did not work so well, because transactions relating to financial receivables often took place under industry rules, and any assignments of those receivables were specially structured among sophisticated players. His delegation therefore supported the approach advocated by EBF, which was to formulate a definition to cover those receivables to which all the rules should apply, namely the trade receivables that were the core area where the draft Convention would have its greatest impact, and then to focus on articles 11 and 12. It could be that, within those core receivables, some consideration should be given to cases where there was an anti-assignment clause, but in other cases articles 11 and 12 worked very well. The most likely candidate for exclusion from articles 11 and 12 would be a receivable arising from a loan of money.

15. His delegation had changed its position because it had listened to the comments of other delegations, and of the industry, and had also learned of some fairly sophisticated problems that could arise if some financial receivables were included within the rules of the draft Convention. It was prepared to discuss those problems at the appropriate time, and could also make a specific proposal in writing. However, its overall conclusion was that the definition of receivables should be narrowed, and that some specific exclusions might be necessary.

16. Mr. MEENA (India) said the draft Convention provided that instructions in respect of receivables should not change the currency of payment specified in the original contract, or change the State in which the payment was to be made, to a State other than that in which the debtor was located. Thus it seemed to be in conformity with the exchange control regulations. However, the draft Convention was not applicable to the financing of domestic receivables. Therefore its provisions needed to be examined with regard to action-control

regulations. Assets based on securities which generally lacked volatility would acquire the desired mobility by trade in international receivables in the manner suggested in the draft Convention. Such a convention was long overdue and, in the context of the expansion of international trade, would have a significant and effective role to play in the assignment of receivables on an international basis. It would be an appropriate and effective instrument for achieving progress towards a new formula in that area. It would improve assignability and enhance international trade and finance by making credit available at lower cost.

17. His delegation therefore supported the draft Convention currently under discussion. However, the rules of assignment of receivables had social and political ramifications, which deserved serious consideration.

18. With those preliminary observations, and without prejudice to its right to offer detailed comments, his delegation hoped that the draft Convention would be acceptable to all concerned. With regard to the limitations on receivables other than trade receivables under article 5, India supported variant B.

19. Mr. WHITELEY (United Kingdom) supported the modified version of variant B proposed by EBF. He agreed with the Italian delegation that it was difficult to avoid reference to the rules of private international law in terms of determining certain issues under article 5, and in fact paragraph 53 of the analytical commentary indicated that under variant A it would still be necessary to refer to laws applicable outside the Convention. The United Kingdom was concerned that those laws might themselves have an adverse effect on the debtor's interest if the assignment was recognized as between the assignor and the assignee. In such cases, as far as the laws of the United Kingdom were concerned, the debtor would lose many of the protections to which it would otherwise be entitled.

20. Mr. STOUFFLET (France) said that, in its consideration of articles 1 to 5 on scope, the Commission had naturally come to focus on the problem of financial receivables. However, some other important issues remained open. In regard to the scope of application of the future Convention, the French Government and others had drawn attention in their comments to the case of non-contractual receivables and he would revert to that issue at a later stage.

21. With regard to financial receivables, his delegation preferred variant B, mainly because it allowed the broadest possible scope of application for the draft Convention. In that context, the French delegation also supported the suggestion from EBF which highlighted the true raison d'être of variant B, namely protecting mechanisms for collective-type settlements. Emphasizing the reason underlying the exception was a major merit of the proposal. The specific wording might require further consideration, but the concept fully met the concerns of his delegation.

22. Mr. RENGER (Germany) said that his delegation preferred article 5, variant B, in the version contained in document A/CN.9/470. Moreover, it would prefer the text of variant B to remain unchanged: the amendment proposed by EBF ("unless the debtor consents ...") was ambiguous.

23. While his delegation was generally in favour of the Federation's proposed amendment to article 6 (1), he suggested that the words "for the sale or lease of goods or the provision of services" should be deleted since some types of contract to be covered under the article - for example, construction contracts - would otherwise be excluded.

24. Mr. DOYLE (Observer for Ireland) said that, like the representative of Germany, he preferred variant B in the version contained in document A/CN.9/470.

25. Mr. DUCAROIR (Observer for the European Banking Federation) said that the proposed amendment to draft article 5 reflected the desire of the Working Group on International Contract Practices and of the Commission to remove unnecessary limitations on the draft Convention's scope of application. However, the wording of the amendment was misleading; it appeared to further limit the application of articles 11 and 12, whereas the intention had been to expand the scope of those articles as much as possible. He suggested that the problem should be referred to the drafting group.

26. He had no objection to the German representative's suggestion for the further amendment of article 6 (1). The primary purpose of the amendment proposed by EBF had been to establish a general regime for trade receivables and a specific regime for financial receivables, which could be defined in greater detail if delegations wished.

27. The CHAIRMAN suggested that the problem should be referred to the drafting group.

28. Mr. SCHNEIDER (Germany) said that it was not always possible to make a clear distinction between substantive issues and drafting problems, but that he was prepared to accept the Chairman's suggestion.

29. Mr. SMITH (United States of America) said that, while he agreed that there was general consensus at the level of policy, various issues required further consideration.

30. The common view seemed to be that all provisions of the draft Convention should apply to trade receivables, however defined. The question then was what rules applied to receivables other than trade receivables. Under variant B, in the case of receivables other than trade receivables, if the underlying contract contained an anti-assignment clause, articles 11 and 12 of the Convention did not apply.

31. However, variant B might prove inadequate in certain cases. If articles 11 and 12 did not apply owing to the existence of an anti-assignment clause, domestic law would prevail; however, anti-assignment clauses were not enforceable under some national legal systems, in which case the provisions of the draft Convention that governed relations between assignor and assignee would apply. Moreover, even in States where anti-assignment clauses were enforceable, the effect of making an assignment despite the existence of such a clause might vary from State to State; it might prevent the assignment from becoming effective or enable the debtor to claim breach of the clause itself.

32. The Commission should consider whether the choice of law rules embodied in the draft Convention should give priority to the jurisdiction of the assignor in such cases or, if the financial receivable was a claim against a broker or a depositary bank, whether the choice of law rule should rather be the location of the debtor, as was the case in some jurisdictions and as was rapidly becoming the modern rule in the case of investment securities. If the Commission concluded that assignment should be effective even in the presence of an anti-assignment clause, it must also decide whether that fact would affect the debtor's right to set off mutual rights and obligations as provided under the legislation of certain States. His delegation also had grave doubts as to the warranty and substantive law proceeds provisions in such situations. The Commission might therefore need to establish specifying exclusions for certain receivables, other than trade receivables.

33. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that draft article 6 (1) was based on the assumption that, where the application of articles 11 and 12 of the draft Convention was excluded, the validity of any anti-assignment clause would be a matter of party autonomy. However, that presumed well-structured financial arrangements between sophisticated parties capable of protecting their own rights; the Commission might wish to provide further protection against adverse effects arising from application of the Convention.

34. The Commission should also consider what effect would be produced by deletion of the words "Unless the debtor consents" from the European Banking Federation's proposed amendment to draft article 5. Of course, the draft Convention would not affect the assignment arrangements contained in the original contract agreed to by assignor and debtor. However, the assignor must consent to any arrangements between assignee and debtor that affected the original contract. The question was whether the Convention should establish whether debtors could waive the protection to which they were entitled under an assignment clause, even where national law allowed them to do so.

35. The problem posed by the definition of trade receivables might be resolved by redrafting the text, replacing "for the sale or lease of goods or the provision of services" with "for the supply of goods, works or services".

36. Thus, apart from the issue of the assignment clause, the Commission might consider the potential for any other untoward effects of the draft Convention on the rights of debtors or third parties; the question of a debtor's right to change the assignment arrangements through negotiation with the assignor or the assignee; the possibility of revising the definition of trade receivables; and the issue of whether references to payments or security settlement systems and receivables arising under financial contracts governed by netting agreements or used as collateral were appropriately included in such a definition in the context of a multilateral treaty.

The meeting rose at 1.05 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirty-third session

SUMMARY RECORD OF THE 677th MEETING

Held at Headquarters, New York,
on Monday, 12 June 2000, at 3 p.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

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DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued)

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00-47539 (E)

The meeting was called to order at 3.05 p.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued) (A/CN.9/466, 470, 472 and Add.1-4)

1. Mr. SMITH (United States of America)* said that his delegation would like to propose the following text for inclusion in articles 6 and 4:

"Article 6. Definitions and rules of interpretation

"For the purposes of this Convention:

"(x) (i) Except as provided in subparagraph (x)(ii), a "receivable" is a contractual right to payment of a monetary sum, owed by a person ("debtor") to an assignor, as:

"(A) Payment for goods sold or leased or for the provision of services [other than financial services];

"(B) Payment for industrial or other intellectual property sold or licensed;

"(C) Payment for a credit card transaction;

"(D) Repayment of a loan of money, regardless of the currency in which denominated; or

"(E) Reimbursement for the payment, pursuant to a guaranty, suretyship obligation, [or other secondary obligation], of the debtor's obligation to a third party.

"(ii) The following are not "receivables":

"(A) Rights to payment arising from transactions on a regulated futures exchange;

"(B) Rights to payment arising from the sale, lease or loan of gold or other precious metals;

"(C) Rights to payment under a financial netting agreement;

"(D) Rights to payment under bank deposit relationships, including those arising under inter-bank payment systems;

"(E) Rights to payment from an insurer under an insurance contract, or from a reinsurer under a reinsurance contract;

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* The United States proposal was subsequently issued as document A/CN.9/XXXIII/CRP.4.

"(F) Rights to payment for goods sold or leased to the extent that under the law of the State where the goods are located the goods are considered to be part of the real estate on which the goods are situated;

"(G) Drawing rights or rights to payment under a letter of credit or independent bank guarantee;

"(H) Rights to payment arising from foreign exchange contracts; or

"(I) Rights to payment arising from the sale or lending of investment securities, including repurchase agreements and rights to payment arising under investment securities settlement systems.

"Article 4. Exclusions and limitations on application of certain provisions

"(3) In the case of receivables described in subparagraphs (D) and (E) of article 6 (x) (i), articles 11 and 12 do not affect the rights and obligations of the debtor [or any guarantor, surety or other secondary obligor for the debtor] unless the debtor [or such guarantor, surety or secondary obligor] otherwise consents".

2. Each category of payment rights that would not constitute receivables under the Convention should be reviewed and compared with variant B of article 5, since the list of exclusions would accomplish what the members of the Commission had intended to achieve with variant B of article 5.

3. Mr. BRINK (Observer for the European Federation of National Factoring Associations (EUROPAFACTORING)) said that more time was needed to study the proposal just made by the United States. That delegation might wish, however, to have a second look at its proposed definition of a receivable. Indeed, if the definition was dependent on the fact that there was an assignor, it would be difficult to establish the existence of a receivable before it was assigned, since only by assigning the receivable did a creditor become an assignor.

4. Mr. BERNER (Observer for the Association of the Bar of the City of New York) said that the text proposed by the United States contained clear and useful changes that would eliminate many instruments and transactions that had no place in the Convention. It would also restore the Convention's focus and make it more workable.

5. Mr. PICKEL (Observer for the International Swaps and Derivatives Association (ISDA)) said that ISDA was an international organization with offices in the United States, London and Tokyo. An office was also due to be opened later in the year in Singapore. ISDA had 500 member institutions from 37 countries and represented the privately negotiated derivatives industry. Its principal role was the development of the standardized documentation used throughout the world to document bilateral relationships between parties in the field of derivatives.

6. The relationships between parties on which ISDA contracts were based evolved over time through additional transactions and through fluctuations in the market value of the underlying transaction entered into pursuant to a master agreement. One of the most important clauses in the master agreement established the single agreement concept, according to which all transactions entered into relied on the fact that the master agreement and all the transactions formed a single agreement between the parties, who would not otherwise enter into any transaction.

7. That provision was important to the concept of netting, which applied to several areas of contracts. When a relationship was terminated, for example, very specific provisions in ISDA contracts provided for obligations under all transactions to be terminated with one net amount being owed by one party to the other. ISDA supported variant B of article 5 because it protected the concept of netting. It believed, however, that the types of exclusions proposed by the United States would be even more beneficial and would better recognize the relationship nature of the contract.

8. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the United States proposal introduced significant changes in the scope of application of the draft Convention. It therefore raised a question of policy, namely, whether the Commission wished to proceed with the elaboration of a list of practices which should be excluded from the Convention. If it decided to so proceed, it would then have to examine the various types of practices described in order to determine whether they qualified for exclusion and then justify each exclusion. A secondary issue was whether, following the adoption of such a restrictive definition of receivables, the Commission would find it necessary to spell out a long list of exclusions.

9. Mr. SMITH (United States of America) said that, while his delegation appreciated the issue of policy which the Secretary of the Working Group had just raised, it considered the scope of the draft Convention to be quite broad. If members of the Commission had been asked at the beginning of the process what types of transactions were to be covered by the draft Convention, no one would have thought of foreign exchange transactions, swaps, sales of investment property or rights to payment from investment accounts. Instead they would have thought only of such transactions as the sale or lease of goods, service contracts, credit card receivables and loans, all of which they currently had difficulty in effecting. But, given the high volume of the flow of payments in those categories, there would be no contraction of the scope and importance of the Convention if the class of receivables were confined to those categories. Indeed, given the novelty of creating uniform rules for all States, confining those rules to the receivables that generated the highest volume and highest value with the least opposition from other financial sectors would constitute a great victory for the Convention.

10. Mr. SCHNEIDER (Germany) said that the United States proposal posed two problems of policy. First, it must be borne in mind that the Convention needed to be geared to the special needs of the banking industry. The second problem concerned the scope of the draft instrument. While variant B of article 5 dealt with one special problem, the new proposal, with its new ideas and new language, would revisit the broader problem of the type of receivables that should be

included in the Convention. Given the limited time available, the Commission should not reopen the discussion and should focus instead on the broad scope of application of the Convention.

11. Mr. FERRARI (Italy) supported the statement just made by the representative of Germany. Before it could accept the United States proposal, the Commission would have to consider each exclusion. His delegation would have difficulty, for instance, with the exclusion of the rights to payment referred to in (ii) (A) of the United States proposal. It supported variant B of article 5.

12. Mr. MORÁN BOVIO (Spain) said that the United States proposal should be examined calmly and dispassionately. Indeed, the text might help to meet the concerns which the Commission wished to address. The main problem with the list of exclusions was its failure to address certain realities. He hoped that the observers attending the meeting, who were perhaps in closer contact with the business world, would help to further clarify certain elements of the United States proposal.

13. Mr. DUCAROIR (Observer for the European Banking Federation) agreed with the representative of Spain that the United States proposal, which was an innovative one, deserved careful study. At the previous session of the Working Group on International Contract Practices, the mandate of the Federation had been to seek the exclusion of financial receivables from the scope of application of the Convention. That proposal, however, had not won broad enough support from the members of the Working Group, who had considered that the scope of application of the Convention should not be limited in such a drastic manner. After careful consideration the members of the Federation had come out in favour of variant B of article 5, subject to the inclusion in article 6 of various definitions of what was not a receivable.

14. The Federation had been taken by surprise by the United States proposal, a quick perusal of which had revealed that the list of exclusions did not fulfil all the wishes of banking and financial circles and left unanswered questions such as those relating to settlements of assets on the stock exchange, which, even though they were receivables, were not included in the scope of application of the Convention. He therefore believed that elements of the Federation's proposal in document A/CN.9/472/Add.1 should be incorporated into the text proposed by the United States of America, should the latter find favour with members of the Commission.

15. Mr. SALINGER (Observer for Factors Chain International) said that a wide range of transactions was currently subject to factoring. Since his association firmly supported a convention on assignment of receivables as a highly useful instrument in international trade, he would be reluctant to see the exceptions proposed by the United States adopted without a careful examination of each one to determine whether or not it was a factoring transaction, a process that would take many hours. Perhaps it was too late in the proceedings to reopen the question.

16. Mr. DESCHAMPS (Observer for Canada) said that variant B of article 5 of the draft Convention sought to exclude financial receivables from the scope of articles 11 and 12. The United States proposal went much further by completely

excluding all sophisticated financial receivables, although it left ordinary financial receivables, such as bank deposits and loans, within the scope of the draft Convention but exempt from the application of articles 11 and 12. While the proposal might appear complex, in essence it revolved around the question of whether to remove sophisticated financial receivables from the scope of the draft Convention altogether, and the Commission could decide that point without considering each subparagraph of the United States proposal in detail.

17. Mr. DOYLE (Observer for Ireland) said that the Commission had begun with a long list of exceptions to the definition of receivables and had reduced that list to the three exclusions set forth in article 4. It was perhaps too late to start the discussion over again. Although the definition of a trade receivable remained to be decided, at least that issue was narrow and should be capable of a quick solution, whereas consideration of the United States proposal might take the entire session.

18. Mr. BERNER (Observer for the Association of the Bar of the City of New York) said that the issue was whether it was safer to err on the side of including transactions that should not be in the draft Convention or of excluding transactions that should be in the draft Convention. In his view, it was better to leave types of transactions the Commission had not specifically focused on to be covered by existing law.

19. Mr. STOUFFLET (France) said that his delegation was not ready to take a position on the interesting and complex United States proposal, but his first reaction was that it showed a lack of confidence in the capacity of the draft Convention to handle assignments of receivables other than trade receivables. Although he was quite prepared to address the well-identified technical needs of financial institutions, such as the need to protect settlement systems, he was unaware of the legal or technical justification for some of the other broad exceptions proposed, such as transactions involving gold. Nor was he convinced by the argument that trade receivables were the largest class of assignments numerically, since matters of principle should not be decided by statistics.

20. Mr. WHITELEY (United Kingdom) said that, although his delegation understood the fear that lists might create more problems than they solved, it was important for the draft Convention to state clearly the criteria governing inclusion or exclusion. The exceptions proposed by the United States appeared to fall into three categories. One category concerned instruments that were traded on financial markets, such as securities or gold. Since such assets were easily transferable, they should perhaps be excluded. The second category related to receivables for which the application of article 11 raised concerns. Although an attempt had been made to address those concerns in variants A and B of article 5, the United States proposal constituted an alternative solution. The third category consisted of receivables that did not fall easily within the priority rules set forth in the draft Convention, which generally provided that priority of claims to a receivable would be determined according to the law of the assignor's location. There were types of receivables, such as land or securities, for which that result might be inappropriate or conflict with other international obligations of potential signatories of the draft Convention. For European Union countries, there were concerns about a possible conflict with the Community directive on settlement finality in payment and securities settlement

systems. His delegation felt that it was necessary to exclude such items in order to make the draft Convention workable.

21. Mr. SMITH (United States of America) said that many delegations had criticized his delegation for the late submission of a complex proposal. He wished that it could have been otherwise. Part of the process, after formulating a set of rules, was then to circulate them broadly to solicit opinions on their practicability and acceptability from the groups that would be affected by them. It was through that process that his delegation had arrived at its list of inclusions and exclusions and had realized that it could not fail to bring to the attention of the Commission the resistance and objections it had encountered. The Commission's goal must be to draft a convention that did the best job possible for the largest number of receivables without, however, posing problems for any industry or trade groups.

22. Mr. SALINGER (Observer for Factors Chain International) said he understood that the United States delegation had consulted with industry groups in the United States, not worldwide. Whereas factoring in the United States tended to be restricted to certain trades, its use worldwide was much broader. Great care would be required in considering each exclusion in order not to weaken the usefulness of the draft Convention.

23. Mr. IKEDA (Japan) said that his delegation would need time to consider the very important United States proposal. Since the outcome of the discussion would influence the choice between variants A and B of article 5 of the draft Convention, article 6 should be considered before article 5.

24. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that it might be useful to clarify the basic differences between an approach based on article 5 and one based on the United States proposal. Variant B of article 5 would leave the decision as to the effectiveness of assignment to other law, but that law might or might not recognize the validity of clauses limiting assignability even for other than trade receivables. For greater protection of the rights of the debtor, the United States was proposing outright exclusion of certain types of receivables from the scope of the Convention. Its proposal consisted of a list of inclusions and a list of exclusions. The Commission might wish to know whether the lists were intended to be exhaustive or merely indicative and what criteria had been applied in drawing up the lists.

25. The CHAIRMAN said that further discussion of the United States proposal should be postponed until it was available in all languages.

26. He invited the Commission to consider article by article the text of the draft Convention submitted by the Working Group in document A/CN.9/466.

Article 1

27. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the Working Group had adopted all of article 1 except for paragraph 3, which referred to chapter V and might be taken up in conjunction with that chapter. However, the commentary (A/CN.9/470) and comments by

Governments (A/CN.9/472 and Add.1-4) had identified issues the Commission might wish to consider.

28. One such issue was whether paragraph 1 (b) should, like paragraph 1 (a), require the assignor to be located in a Contracting State. With regard to paragraph 1 (c), the United States had suggested a drafting change to make it clear that assignments under paragraph 1 (c) were not actually a different category from assignments under paragraph 1 (a). In relation to paragraph 2, it was suggested in paragraph 17 of the commentary (A/CN.9/470) that the Commission might wish to consider specifying the time at which the debtor needed to be located in a Contracting State or the receivable needed to be governed by the law of a Contracting State. Paragraph 16 of the commentary suggested that the Commission might wish to address the question of whether the courts of a non-Contracting State would apply the draft Convention only if its substantive and territorial requirements were met.

29. Mr. COHEN (United States of America) said that, although his delegation supported the policy underlying paragraph 1 (b), which was intended to cover a chain of assignments, it felt that the present wording was misleading. As written, paragraph 1 (b) appeared to override both conditions set in paragraph 1 (a), namely, that either the receivable or the assignment must be international and that the assignor must be located in a Contracting State, whereas the intention had been merely to eliminate the requirement of internationality. The result could be to make the draft Convention applicable in cases where a subsequent assignee would have no reason to suppose, and no opportunity to ascertain, that it would apply. His delegation had proposed, in document A/CN.9/472/Add.3, that paragraph 1 (b) should read:

> "(b) A subsequent assignment by an assignor located in a Contracting State at the time of the conclusion of the contract of assignment, provided that any prior assignment is governed by this Convention; and".

30. Mr. MORÁN BOVIO (Spain) questioned whether the wording proposed by the United States might not interfere with the principle of continuatio juris, as discussed in paragraphs 18 and 19 of the commentary (A/CN.9/470), particularly in the case of securitization transactions.

31. Mr. COHEN (United States of America) said that his delegation generally supported the principle of continuity but nevertheless felt that it had its limits. If it led to surprising results that the original assignor and assignee could not have anticipated, it had been taken too far. Requiring the assignor to be located in a Contracting State would give some notice to the parties involved that the draft Convention might apply.

32. Mr. SCHNEIDER (Germany) observed that there could be no element of surprise since both the assignee and the assignor would always be aware of the application of the Convention in prior assignments. There was therefore no need to change the text of paragraph (1) (b) to include a rule governing exceptions.

33. Mr. FERRARI (Italy), concurring, said that an assignor would always know the nature of the receivables. Only the assignee might in certain instances be

under the mistaken impression that all assignments were domestic because of the location requirement. The text should therefore not be changed.

34. Mr. BRINK (Observer for the European Federation of National Factoring Associations (EUROPAFACTORING)) endorsed the position of the German and Italian representatives.

35. The CHAIRMAN said that there seemed to be no support for the proposed United States amendment to article 1 (1) (b).

36. Mr. COHEN (United States of America) drew attention to his delegation's proposed wording for article 1 (1) (c) (A/C.9/472/Add.3, p. 4) and said that the problem, as the Secretary of the Working Group had already explained, was one of clarity, not of substance.

37. The CHAIRMAN said he took it that the Commission wished to refer the United States proposed amendment to article 1 (1) (c) to the Drafting Group.

38. It was so decided.

39. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices), referring to article 1 (2), pointed out that whereas in article 1 (1) the Convention applied only if the assignor was located in a Contracting State at the time of the conclusion of the contract of assignment, article 1 (2) did not deal with the issue of the time when the debtor needed to be located in a Contracting State. For the sake of consistency, the Commission might wish to specify the time of conclusion of the original contract also with regard to the location of the debtor, even though by doing so it would create a degree of uncertainty as to the application of the Convention, a disadvantage discussed at the end of paragraph 17 of the commentary (A/CN.9/470). It should be noted that the proposed amendment to article 39 (A/CN.9/470, para. 215) also took the same approach on the issue of time, as did article 3 in connection with the internationality of a receivable.

40. Mr. MORÁN BOVIO (Spain) said that including a reference to the time of the original contract in article 1 (2) would clarify the text.

41. Mr. FERRARI (Italy), concurring, recalled that the issue had come up in connection with the Convention on International Factoring, and the adoption of a similar rule had created no problems.

42. The CHAIRMAN said he took it that the Commission wished to refer the stipulation of a time in article 1 (2) to the Drafting Group.

43. It was so decided.

44. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) recapitulated the points set out in paragraph 16 of the commentary (A/CN.9/470) with reference to article 1 and said that the Commission might wish to address the admittedly minor question that arose in relation to the application of the Convention by courts of a non-Contracting State.

45. Mr. FERRARI (Italy), supported by Mr. MORÁN BOVIO (Spain), said that if the assignor was not located in a Contracting State, the court of a Contracting State would have to decide whether or not the Convention applied, and whether it applied by virtue of article 1 (1) (a) or of applicable private international law. A court in a non-Contracting State would not be bound by the draft Convention. However, the problem referred to by the Secretary of the Working Group arose when the rules of private international law of a non-Contracting State required the law of a Contracting State to be applied. In such a case, a judge in a non-Contracting State would be precluded from looking into the matter. If, on the other hand, no rule of private international law applied, the judge must look into the matter and apply the draft Convention if the requirements of article 1 (1) (a) were met in the non-Contracting State.

46. Since no rules could ever be made for non-Contracting States, the text should be kept as it was, with the Convention being applicable whenever the requirements of article 1 (1) (a) were met.

47. The CHAIRMAN said he took it that the Commission wished to retain the text of article 1 (1) (a).

48. It was so decided.

Article 2

49. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that a number of issues had been raised by Governments and organizations (A/CN.9/472 and Add.1-4) and in the commentary (A/CN.9/470, pp. 12-17). With reference to article 2 (a), there was a proposal by France (A/CN.9/472, p. 6) that, as a minimum, non-contractual receivables should be covered by the draft Convention, through the introduction of an optional system. Furthermore, paragraphs 30 to 34 of the commentary (A/CN.9/470) suggested that: the Convention should cover the assignment of non-monetary rights convertible to a monetary sum and non-monetary contractual rights to performance; it should be made clear that not only all but also part of a receivable could be covered by the Convention; and it would be well to clarify in both article 2 and article 9 that the statutory limitations on assignment, other than those addressed in article 9, were not covered by the Convention.

50. Mr. STOUFFLET (France) said that his delegation would still prefer to extend the scope of article 2 to include non-contractual receivables. There were practical reasons for so doing: the assignment of non-contractual receivables was a very widespread practice, as in the case of the reimbursement of value added taxes. There were also legal reasons: different legal systems had different definitions of the term "contractual", thus making it difficult to apply article 2 as drafted. If the limitation only to contractual receivables was eliminated, however, the Working Group would face a drafting problem, for many articles referred to the contract from which the assigned receivable arose. Rather than redrafting all such references, the problem could be handled by including a general statement that what was meant in all cases was the "act" giving rise to the assignment. If, however, the Commission wished to maintain the limitation, the inclusion of an option system would indeed be a compromise solution.

51. Mr. AKAM AKAM (Cameroon) did not object to the scope of the draft Convention being extended to non-contractual receivables, which were sometimes quite substantial.

52. Mr. SCHNEIDER (Germany) said his country had always favoured the inclusion of non-contractual receivables. He supported the compromise proposed by the representative of France.

53. Mr. COHEN (United States of America) commented that several substantive provisions in the existing text, such as the rules on debtor protection, debtor's discharge by payment and the location of the debtor, would not work so well if applied to non-contractual receivables. It was not merely a question of extending the scope of the draft Convention. Every individual rule in the text would have to be tested in order to ascertain whether it would work for non-contractual receivables, and he wondered whether the Commission was prepared to do that. A possible solution would be for the Commission to decide to confine the present draft articles to contractual receivables and to adapt its future work on secured credit to cover non-contractual receivables.

54. The CHAIRMAN observed that the Commission would indeed have to re-examine all the draft articles if it intended them to apply to non-contractual receivables. That was an important point to consider.

55. Mr. DOYLE (Observer for Ireland) said that his delegation, which had originally favoured the inclusion of non-contractual receivables, now accepted the view of the Working Group that it was better to exclude them. As the text now stood, the draft articles implied exclusion, and the text might be damaged by attempting to include non-contractual receivables.

56. Mr. FERRARI (Italy) said that it was not merely a question of drafting. If it became optional to include non-contractual receivables, a judge located in a Contracting State which had chosen that option would have to apply the Convention even if it would not otherwise apply.

57. Mr. ONG (Singapore) agreed with the representative of the United States that it would be simpler to confine the Convention to contractual receivables.

58. Ms. McMILLAN (United Kingdom) said that it would not be a good idea, at the present late stage of drafting, to include non-contractual receivables in the scope of the Convention. Virtually all the draft articles would have to be reviewed, and the problem of swaps and derivatives would have to be dealt with. That would place too much strain on the text. It would be better to provide for non-contractual receivables in a separate draft.

59. The CHAIRMAN concluded that there was no consensus within the Commission for departing from the Working Group's position on non-contractual receivables.

60. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that draft article 2 (a) did not at present address the issue whether part of a receivable was assignable. However, the position of a debtor in a partial assignment had to be addressed within the substantive provisions of the draft Convention, because in some cases, a debtor receiving a notification

concerning a partial assignment might be asked to make part payment to different persons. The position of the debtor in such cases could be addressed in the context of the debtor's discharge, in draft articles 18 and 19. There was also the question of rights convertible to money and non-monetary contractual rights to performance. Such rights, if assigned, might be receivable under more than one regime. The assignment of rights convertible to money might already be implicitly covered in the draft articles, since those rights would become contractual receivables if there were in effect an agreement that they should be convertible.

61. Mr. MORÁN BOVIO (Spain) objected to the idea of making provision for the assignment of parts of a receivable, which could create difficulties for both the debtor and the assignee. It was important to preserve the principle of the unity of the receivable.

62. Mr. STOUFFLET (France) said that the absence in the draft articles of any mention of assignment of parts of receivables did not necessarily mean that they could not be assigned. Although not regulated by the Convention, such assignments might be permissible. He suggested that the point should be clarified in the commentary.

63. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the validity of partial assignments was confirmed in draft article 9. The insertion of the words "all or part" in article 2 (a), as proposed in paragraph 32 of document A/CN.9/470, would mean that the remainder of the draft Convention also applied to partial assignments. That would cover the position of a debtor faced with notification of a partial assignment and with requests by different people for payment of parts of a receivable.

64. Mr. SALINGER (Observer for Factors Chain International) said that in factoring it was difficult to invalidate assignments of parts of receivables. Goods might be delivered under a contract over a period of several months and be payable in separate parts. Where the whole of a sum due was to be assigned, difficulties would arise if there was no provision for the assignment of parts. It was also common practice, in some jurisdictions, for assignments to be split between different factors or to be shared among factors.

65. Mr. BRINK (Observer for the European Federation of National Factoring Associations (EUROPAFACTORING)) agreed with the previous speaker. Partial assignments were common in non-recourse factoring, part of a receivable being taken by way of purchase and the rest being collected without that part of the receivable being assigned. It was important not to invalidate such practices.

66. Mr. FERRARI (Italy) said it was not necessary for the Convention to spell out that parts of receivables were assignable, since that could be inferred from article 9. One of the underlying principles of the draft was to promote assignment as such, and that in itself validated the assignment of parts of receivables.

67. Ms. WALSH (Observer for Canada) endorsed the comments just made. However, it was important to have explicit confirmation of the validity of partial assignments. As for the concern that a debtor would be exposed to dealing with

multiple assignees and multiple payments, she suggested, as a compromise, that draft article 11 should be confined to the whole of a receivable. That would mean that a debtor who included in the original contract a restriction for partial assignments would be able to rely on the restriction at a later stage.

68. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that, if the words "all or part" were inserted in draft article 2 (a) before "of the assignor's contractual right", the draft Convention as a whole, and not merely article 9, would apply to partial assignments. The question of protecting the debtor in partial assignments could be discussed in the context of draft articles 18 and 19, or in the context of draft article 11, as suggested by the representative of Canada.

69. The CHAIRMAN said that there appeared to be a consensus within the Commission for validating partial assignments.

The meeting rose at 6 p.m.